UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

CYNTHIA A. WALKER, Plaintiff, vs. JO ANN L. BARNHART, Commissioner of Social Security, Defendant.	No. **C01-4047 MWB** **REPORT AND RECOMMENDATION**

I. INTRODUCTION

The plaintiff Cynthia A. Walker ("Walker") appeals the decision by an administrative law judge ("ALJ") denying her Title XVI supplemental security income ("SSI") and Title II disability insurance ("DI") benefits. Walker argues the ALJ erred in finding Walker retains the physical and mental residual functional capacity to work, and by applying incorrect standards in evaluating the evidence. (*See* Doc. No. 8)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On May 13, 1997, Walker filed applications for DI benefits (R. 318-20) and SSI benefits (R. 595-96), alleging a disability onset date of April 4, 1994.[1] The applications were denied initially on August 13, 1997 (R. 303, 305-08, 598-602), and on reconsideration on November 19, 1997 (R. 304, 310-14, 603-08). Walker requested a hearing, which was held before ALJ Andrew T. Palestini on June 2, 1998, in West Des Moines, Iowa. Attorney Ruth Carter represented Walker at the hearing. Walker, Walker's friend Bob Hutchinson, and Vocational Expert ("VE") Jack E. Reynolds testified at the hearing. (R. 80-99M)

[1]Walker had filed claims for DI and SSI benefits previously, in November 1994, claiming a disability onset date of July 2, 1991. (R. 100-106, 180; *see* R. 121-51) The applications were denied initially on January 10, 1995 (R. 107-111; *see* R. 152-76), and upon reconsideration on April 5, 1995 (R. 113-117, 177-79, 181-83). Walker requested a hearing, but when the hearing office was unable to locate Walker, the case was dismissed. (R. 16, 65-79, 289-93, 295-99) By alleging a disability onset date within the previously-adjudicated period, the ALJ deemed Walker had, by implication, requested reopening and review of the April 5, 1995, denial decision. The ALJ found Walker had failed to establish the requisite good cause to reopen the prior decision, and therefore only considered Walker's entitlement to benefits since April 4, 1994. (*See* R. 16-17) Walker has not challenged this finding in her brief to this court, and the court therefore also will consider Walker's entitlement to benefits from and after April 4, 1994.

On September 21, 1998, the ALJ ruled Walker was not entitled to benefits. (R. 13-43) The Appeals Council of the Social Security Administration denied Walker's request for review on April 13, 2001 (R. 8-9), making the ALJ's decision the final decision of the Commissioner.

Walker filed a timely Complaint in this court on May 15, 2001, seeking judicial review of the ALJ's ruling. (Doc. No. 3) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Walker's claim. Walker filed a brief supporting her claim on October 9, 2001 (Doc. No. 8). On December 10, 2001, the Commissioner filed a responsive brief (Doc. No. 11). The court now deems the matter fully submitted, and pursuant to 42 U.S.C. § 405(g), turns to a review of Walker's claim for benefits.

B. Factual Background

1. Introductory facts and Walker's daily activities

a. Walker's testimony

At the time of the hearing, Walker was 42 years old, and living in Sioux City, Iowa, with her boyfriend. She completed a two-year degree in respiratory therapy in Arizona, in 1988. She began working part-time in different hospitals while she was still in school, putting in eight-hour shifts. (R. 81-84) She described her job duties as follows:

> You give breathing treatments to patients having difficulty breathing. We assist in Code Blues and Code Reds and work in intensive care putting people on respirators to keep them breathing. Worked in pediatrics setting up with kids and helping pediatric patients breathe. We also did a symmetry test which, which measured your oxygen levels, and we had various other respiratory equipment that we had to set up on patients.

(R. 84) Walker said she lifted equipment weighing 15 to 20 pounds, and she was on her feet all day. (R. 84) She had to lift patients from bed to a chair. She sometimes had to perform CPR until a doctor told her to stop, which "could be anywhere from two minutes to a half hour." (R. 99f)

She stopped working as a respiratory therapist in April of 1994, when she was discharged due to excessive absenteeism after she hurt her neck at work. She filed a worker's compensation claim, and she was awarded benefits. (R. 84-85)

Walker's neck injury consists of a bulging disk at the C-5/C-6 level. Her doctor will not perform surgery due to the risk of paralysis. She uses a TENS unit when her pain gets bad.[2] Walker stated her neck injury has prevented her from working since April 1994, explaining, "When I sit or stand or try to hold myself in one position too long, the muscles flare up around my neck and causes extreme pain. The pain goes down my whole left side and around my upper torso." (R. 85) She does not believe she could perform a job that involved lifting and bending. (*Id.*) She can sit for one-half to one hour before her neck and shoulder start to hurt. The pain sometimes goes into her throat. (R. 85-86)

Walker said her left arm is what gives her trouble with lifting and bending. She can lift up to 10 pounds with either of her arms. If she tries to lift more than 10 pounds, she experiences pain and "end[s] up having to lay down and put some ice packs on it." (R. 86) When she bends, her lower back hurts. (*Id.*)

Walker is not receiving any type of treatment for her neck. She has not seen a doctor "for a few years," because she is unemployed and has no money to see a doctor. (R. 87) The last time she saw a doctor for her neck condition was in 1995. (R. 89-90) On a scale

[2]Walker stated an orthopedic surgeon, Dr. Wheeler, recommended the TENS unit. (R. 87)

of one to ten, Walker rated her neck pain as eight at the time of the hearing, noting she was very tense. Usually, her pain is not as bad in the morning, possibly a one or two on a scale of ten. By night time, the pain has increased up to a seven or eight. (R. 87)

Walker described her pain as starting "approximately right through the base of the neck and at that joint." (R. 88) The pain prevents her from doing things around the house. Her boyfriend does all the laundry because Walker is unable to carry the laundry baskets. (*Id.*)

Walker's pain has stayed the same since its onset in April of 1994. Doctors have prescribed various anti-inflammatory medications, but none of them worked. She has also tried physical therapy with minimal results. Walker said she does not sleep well, only getting about four hours of sleep per night. The pain prevents her from falling asleep, and when she finally does, the pain wakes her up. (R. 88-89) At the time of the hearing, Walker was taking Paxil, an anti-depressant; Depakote, also an anti-depressant, which Walker said "helps with the voices that I hear"; and Risperdal to help her sleep. (R. 89)

Walker testified she began having emotional problems when she was raped by her father and her uncle at age five. She did not receive a lot of counseling while she was growing up. Her problems began to appear when she was working in 1992. Her boss referred her to a Dr. Gates through an employee assistance program. The doctor diagnosed her with anxiety and depression, and began treating her with anti-depressants. (R. 90-91) She has continued to see Dr. Gates through the present date. She also sees a psychiatrist, Dr. Wheeler, who is treating her for both the depression and a borderline multiple personalty disorder. Walker stated whenever she gets very angry, there will be periods of time that she cannot remember. Walker has also seen counselor Shelly Boykin on a semi-regular basis. (R. 91)

Walker said when she is upset, depressed, or in "any kind of emotional state," she hears voices calling her name. She only hears the voices when she is alone; "they don't do it when other people are in the room." (R. 92)

Walked explained that some days are worse than others. In a given month, she estimates she will have 17 bad days, which she described as follows: "To me[,] nothing goes right on that day, nothing. I can get up and the sun won't be shining. That'll be a bad day for me. I can't do nothing right. Can't say, can't get out of my mood. I try to stay in my house. I won't answer the phone. Avoid people. Avoid answering the door." (*Id.*) Walker constantly thinks people are talking about her and staring at her. She has trouble getting along with other people, and will go out of her way to avoid people. She stays in her house most of the time. Her boyfriend does the grocery shopping, and she stays at home. She has no outside activities and does not go out to the movies, church, local events, libraries, etc. (R. 93-94) She has a driver's license, but she does not have a car. Her boyfriend is gone to work all day, and Walker does not like to go anywhere alone because she fears someone will hurt her. She occasionally will go to the store with her boyfriend. (R. 94)

When Walker is alone at home, she plays with her children, watches TV, does some light dusting, and washes the dishes. She said housework "takes me longer than it should," and she has days when she does not clean the house at all. She has some days when she gets out of bed and goes straight to the couch to lie down, and other days where she is unable to rest at all. (R. 94-95) Walker said she is "very depressed." (R. 95) She has trouble getting herself dressed and bathed, and sometimes will go for three days without bathing. (R. 95) Walker will not take a bath unless someone else is home because she fears someone will come into the bathroom "and try to get me." (R. 97)

Walker said her family "doesn't have anything to do with me." (R. 95) The only friend she sees is Bob [Hutchinson][3], a friend who is disabled due to liver failure and post-traumatic stress disorder. (R. 95, 99d)

Walker testified she does not work well under pressure or under deadlines, and she has trouble getting along with people. She stated, "My last job, my boss pulled me off to the side and told me she was going to put me back in the filing room by myself because my co-workers were afraid of me[.]" (R. 96) Walker said she has trouble making decisions, and she has short-term memory problems. Nevertheless, she stated that on a simple job, where she might be instructed to "go here, pick up this and come back," she would be able to remember that instruction. She is able to be on time for work, and she can withstand criticism, but said she "wouldn't take it very well." (R. 96-97)

Walker has a history of abusing alcohol and other drugs. She testified she last had a drink and used illegal drugs in May 1997, when she went to treatment. She said she has been clean since she got out of treatment, because "[I] [d]ecided I wanted to live instead of die." (R. 97-98) Since May 1997, Walker said the only drugs she has used have been those prescribed by her doctors. (R. 98) However, on examination by the ALJ, Walker admitted the May 1997 date may not be accurate, and she may have last used marijuana around September 1997. Between May and September 1997, Walker said she probably smoked marijuana around once a week. (R. 99a) She said Dr. Fulton's office notes from October of 1997, indicating Walker had slipped and used intravenous methamphetamine on a couple of occasions since treatment, were not accurate. Walker explained that due to her memory problems, she may have given Dr. Fulton inaccurate information at her office visit. (R. 98-99)

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[3]Hutchinson's brief testimony is summarized *infra,* at page 8.

It appears Walker last worked in February or March of 1997, as an insurance clerk. (R. 99a) She performed the job for more than 30 days but less than 90 days; she could not recall if she performed the job for a full 60 days. (R. 99e)

b. Bob Hutchinson's testimony

Bob Hutchinson is a friend who has known Walker for over ten years. He is aware that Walker is in pain all the time from her neck injury. He stated if Walker is "in a lot of pain, she doesn't get a lot of stuff done." (R. 99b) He said Walker will comment on her pain. (R. 99c)

He said he has noticed Walker having emotional problems, including daily paranoia, inability to make decisions, nervousness, and fear. As an example of Walker's paranoia, Hutchinson said she is afraid to answer the door. She thinks she hears someone in the house, and she will have Hutchinson go check to be sure no one is inside the house. (R. 99c-99d) Hutchinson has never seen Walker use drugs or alcohol. (R. 99d)

2. Vocational expert's testimony

VE Jack Reynolds testified at the hearing. Prior to the hearing, he prepared a past relevant work summary. After listening to Walker's testimony, the VE said it appeared Walker's "work as a respiratory therapist was performed at a light level of physical exertion." (R. 99e) However, after some clarification by Walker as to her duties, the ALJ agreed to leave the designation of the respiratory therapist job as medium level work. (R. 99f)

The ALJ asked the VE the following hypothetical question:

> I'd like the vocational expert to initially find, assume that I find that the claimant would be able to sit for at least an hour at a time for a maximum of eight hours, can stand for one hour at a time for a maximum of six a day, can walk for at

> least 30 minutes at a time. The claimant is able to lift up to 20 to 25 lbs. occasionally and up to 10 lbs. frequently. She should not lift above shoulder or head level. She is at least occasionally able to kneel, squat, crawl, climb, push, pull, operate foot controls. She can occasionally bend. She'd be able to use both hands for grasping, manipulation, handling. The claimant would be limited to simple, routine, repetitive work operations. There's no limitation on her ability to either read, write, make change. The claimant should not work in environments that are more than normal stress level which would rule out high gauge production. The claimant can directly interact with the public, at least superficially. She'd be able to work in areas where the public is present. She should not have to interact frequently with co-workers doing a job function, but can at least occasionally. With those limitations and abilities, could she continue to perform any of the jobs listed on [her past relevant work summary]?

(R. 99g-99h) The VE replied that the limitations in the hypothetical would preclude any of Walker's past relevant work, "in just the mere fact that [it] is more than simple, routine and repetitive work activity." (R. 99h)

The ALJ then asked, "Considering that the claimant is a younger individual with a high school education and the training in respiratory therapy and the past relevant work she has described today, would there be unskilled jobs that she could perform under the hypothetical in question?" (*Id.*) The VE replied:

> I believe there would remain unskilled jobs under this hypothetical. I believe there would be jobs such as a document preparer, DOT code of 249.587-018. This is a sedentary job. There are 350 jobs in Iowa, 49,000 nationally. A second job would be that of a parking lot attendant or parking cashier, DOT code 211.462-010 with 600 jobs in Iowa, 65,000 nationally. This is a job that's classified as light according to the DOT. Another job would be that of a[n] office helper, DOT code of 239.567-010. Also classified as light, 400 jobs in Iowa and 50,000 nationally. That would be a sampling of the jobs within the hypothetical.

(*Id.*)

The ALJ amended the hypothetical to include "that on at least 17 of 30 days a month, [the claimant] would be unable to function, with possibly not being able to leave the house," and asked whether that would affect the claimant's "ability to perform sedentary and light work with the samples you gave on a competitive basis." (*Id.*) The VE responded that with the additional limitation, the entire occupational base of the claimant's competitive employment would be eliminated. (R. 99i)

In response to questions from Walker's attorney, the VE stated his sources for the statistics related to the numbers of parking lot and cashier positions include vocational surveys, job service via Iowa Work Force Center, Census data, and Bureau of Labor statistics, all within the last year. The VE reiterated that the jobs of parking lot attendant or cashier and office helper would require only superficial interaction with the public or coworkers. (R. 99i-99k)

3. Walker's medical history[4]

The record contains a large volume of medical records concerning Walker's treatment, beginning in September 1991, and continuing through June 1998.[5] It appears Walker first injured her back while lifting a patient at work in September 1991. X-rays indicated minimal disc space narrowing at L5-S1, but there are no records of treatment beyond initial bedrest and prescriptions. (R. 184-86)

Walker strained her back and neck muscles, possibly while mowing the lawn, in early August 1992. She was treated conservatively with prescription medications and ice/heat

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[4]The medical records in the Record are summarized in Appendix A to this opinion.

[5]*See* note 1, *supra.* The court's discussion of Walker's medical history prior to April 4, 1994, is for the sole purpose of placing her condition on and after that date into context, and should not be deemed to reopen the prior denial of benefits.

packs. (R. 187-89) At a recheck on August 12, 1992, Dr. S.E. Vlach noted the presence of "a few reactive lymphs" and "the outside possibility of fibromyalgia or a viral myositis developing." (R. 190-93) At Walker's next recheck on August 13, 1992, with Dr. Mark Wheeler, the doctor noted Walker had a several-month history of back pain. Dr. Walker found Walker to have probable fibromyalgia, and referred her to internal medicine specialist Nils Erikson, M.D., and to physical therapy. (R. 394)

Dr. Erikson examined Walker on September 4, 1992, and diagnosed myofascial pain. He noted Walker was positive for antinuclear antibodies (ANA), but of undetermined significance. The doctor prescribed a TENS unit and switched some of Walker's medications. He recommended Walker continue physical therapy, and scheduled a follow-up in two weeks. (R. 212-13) His impression was unchanged at the follow-up. He noted Walker had "inquired about the possibility of returning to work," and he opined it would be reasonable to try about a week after beginning some new medications, noting, "She should probably work about half time for the first week and then resume full-time work if she tolerates that." (R. 214)

Walker attended physical therapy sessions at Marian Health Center beginning August 14, 1992. While the therapy notes indicate some improvement during those times when Walker received regular treatments, she frequently cancelled or failed to show up for treatments. Her last visit was on September 14, 1992. When she failed to show up for appointments on September 18, 21, and 25, she was discontinued from physical therapy for failing to keep her appointments. (R. 387-91)

Walker returned to see Dr. Erikson on November 6, 1992. He noted she had some progressive improvement, and she was back to work full time. She was tolerating her medications, and reported she only needed to use Darvon and the TENS unit "after a stressful and heavy load at work." He instructed her to continue her current therapeutic program and gradually taper off her medications. (R. 214)

Walker continued to do well until late April 1993, when she returned to see Dr. Erikson complaining that her neck pain had returned. Walker could not point to a specific injury that caused her pain to return, but noted increasing stress at work and in her personal life. She was "back to using the TENS unit quite regularly" and indicated she had resumed physical therapy, although no additional physical therapy notes appear in the record. Dr. Erikson prescribed Baclofen for muscle spasm and pain control, Pamelor to help her sleep, and recommended she back off the medications and resume regular activities as her pain improved. (R. 215)

Walker underwent a hysterectomy and left salpingo-oophortectomy in late May 1993. The record indicates she was able to return to work half time in late July 1993, with an instruction to return to full shifts when her strength returned. (R. 194-204; 205-11; 225) Walker returned to see Dr. Erikson on October 12, 1993, complaining of slowly progressive sleep disturbance since her return to work following her hysterectomy. Dr. Erikson adjusted Walker's medications. (R. 215) Walker saw Kevin Folchert, M.D., on October 20, 1993, complaining of continued neck pain. Dr. Folchert diagnosed chronic cervical musculoskeletal pain, and noted the pain was "most likely situational in nature associated with personal problems and chronic nature of her illness." He adjusted her medications and ordered an X-ray of Walker's cervical spine. The X-ray was unremarkable. (R. 226, 227, 430)

On November 18, 1993, Walker saw Carol L. Roge, M.D., for follow-up of her neck pain. Dr. Roge scheduled MRI and EMG studies the following week. On November 23, 1993, Walker appeared at the emergency room complaining of chronic neck pain, which she reported could be work-related. X-rays of her cervical spine indicated "[m]ild to moderate left lateral recess and neural foraminal stenosis at C5-6 due to small disc protrusion and mild spondylosis[.]" (R. 217-18, 427) The EMG study of Walker's left upper extremity was normal. (R. 219-20, 428-29)

On November 24, 1993, Dr. Roge admitted Walker into a program through Marian Health Center "for intensive out-patient therapy for depression and anxiety." Her initial diagnosis was dysthymia.[6] Dr. Roge noted Walker exhibited symptoms of "depressed mood, poor appetite, difficulty concentrating, several recent work absences, suicidal feelings at times, difficulty dealing with loss of boyfriend and brothers' terminal illness." Walker was treated with antidepressants, and between November 24, 1993, and January 3, 1994, Walker attended eleven days of treatment sessions.[7] (R. 221-24) She concurrently saw Dr. Roge for regular therapy sessions. (R. 228, 230-33) By the time she was discharged from the treatment program, Walker had returned to work and was doing well. She was discharged on Paxil and Valium, and continued to see Dr. Roge for individual treatment sessions. (R. 221-24) Walker continued to have tenderness and some tightness in her left neck and shoulder region, but none of the "numbness or loss of feeling that she had previously in that left arm." (R. 233, 421)

The next time Walker was seen for a recheck of her neck problems was four months later, on May 11, 1994, when she saw Dr. Roge. Walker was taking ten milligrams of Valium three times a day for myofascial spasm and pain. She had run out of Paxil and had not had the prescription refilled, and she denied any depressive symptoms, although Dr. Roge noted Walker was experiencing a lot of stress due to losing her job for too much absenteeism. The doctor noted Walker's "affect is brighter than I have seen her previously." Walker had full range of motion of her shoulders, although she still exhibited a lot of muscle spasm in her left trapezius and neck area. Dr. Roge talked to Walker about

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[6]Dysthymia is "a mood disorder characterized by depressed feeling (sad, blue, low, down in the dumps) and loss of interest or pleasure in one's usual activities and in which the associated symptoms have persisted for more than two years but are not severe enough to meet the criteria for major depression." *Dorland's Illustrated Medical Dictionary*, 521 (27th ed. 1988).

[7]Walker missed the last few days of treatment due to her brother's terminal illness. Walker's brother eventually died from HIV disease. *See* R. 231, 232, 422.

trying to wean her off Valium, and noted Walker likely would need anti-anxiety medication "on a chronic basis." The doctor prescribed a trial of Elavil. (R. 235, 419)

Dr. Roge refilled Walker's Valium and Amitriptyline prescriptions in July and August 1994, and saw Walker again for follow-up of fibromyalgia and depression on September 7, 1994. Walker reported she was feeling better since she had restarted Paxil in July. She was still taking Valium three times a day, and Amitriptyline at bedtime. Although Walker said she had "ups and downs," she reported she generally was doing better than she had in the past. Dr. Roge noted Walker "would benefit from ongoing counseling but she doesn't have any employment at this time." She referred Walker to Siouxland Mental Health, and advised her that she might want to apply for Medicaid. (R. 236, 418)

On Dr. Roge's referral, Walker began seeing Michele A. Boykin, MSW, LISW, at the Siouxland Mental Health Center, on September 16, 1994. Over the next couple of months, Walker's counseling sessions dealt with issues relating to her marriage, the death of her brother, her weight, and her current relationship. Walker frequently reported being under a lot of stress due to pending litigation concerning her firing from Marian Health Center, her financial situation, and pain from fibromyalgia. (*See* R. 237-42, 485-91)

When Walker did not seem to be improving despite ongoing antidepressant medications and Valium, Ms. Boykin referred Walker to Rodney J. Dean, M.D., for a psychiatric medical evaluation. Dr. Dean saw Walker on November 2, 1994. Walker told the doctor she had been "black balled" by Marian Health Center, and she was unable to get another job because of chronic pain. She stated her disability would not allow her to engage in gainful employment. Dr. Dean diagnosed Walker with dysthymia and recurrent depression, and suggested increasing her Paxil dosage in hopes she could decrease her dependence on Valium. He also suggested referring Walker to the Pain Management Clinic for some non-pharmaceutical alternatives to deal with her pain. (R. 482-84)

Walker continued to see Ms. Boykin for counseling, and on November 18, 1994, Walker reported improvement in how she was feeling and behaving. She said others had noticed she was smiling more. She stated she had more energy and she was "actively interviewing for a job. She feels optimistic that something will be coming through soon for her." (R. 243, 480) On December 2, 1994, at Walker's next appointment, Ms. Boykin noted walker looked better physically, she was bouncier in her posturing, and her face was animated when she spoke. She had cut back on Valium, and continued to take Paxil. She had not yet found a job, and Ms. Boykin made some suggestions regarding Walker's appearance that could affect how she presented at an interview. (R. 245, 479)

In an opinion letter to Disability Determination Services dated December 16, 1994, Ms. Boykin stated Walker was working diligently in her therapy, she wanted to find employment, and Ms. Boykin could see no reason why Walker could not function mentally or emotionally in a work setting, although she was unsure whether Walker's physical impairment might limit or prevent employment opportunities. Ms. Boykin also noted Walker was capable of handling her own finances. (R. 246)

When Walker next saw Ms. Boykin, on December 21, 1994, she looked haggard and was afraid she was losing weight. Walker resisted Ms. Boykin's suggestion that she might seek eating disorder treatment, and she discussed the possibility of enrolling in school the next fall. (R. 247, 477, 478) Ms. Boykin saw Walker again on January 6, 1995, and noted Walker appeared in very bad shape. She reported that lifting some groceries had exacerbated her neck pain, and she had upped her Valium to three per day. She asked the counselor for seven Valium to get her through the weekend until she could see Dr. Dean. Ms. Boykin gave her the seven Valium, but suggested Walker might be experiencing withdrawal symptoms. She said Walker's Valium would not be refilled until she saw Dr. Dean. (R. 248, 476)

Walker missed her next appointment with Ms. Boykin on January 20, 1995. (*See* R. 249) When Walker next saw Ms. Boykin on January 30, 1995, she said her boyfriend's mother had been visiting for two weeks, and apologized for the missed appointment. Walker said she wanted to get off Valium and discussed the possibility of going to the Pain Clinic in Iowa City. (R. 249-50, 473-74)

Dr. Dean wrote an opinion letter to Disability Determination Services on February 9, 1995, discussing Walker's anxiety and depression. He listed Walker's working diagnosis as dysthymia. Dr. Dean opined Walker was significantly impaired in terms of her ability to function in any type of gainful employment due to, back pain, chronic depression, fibromyalgia, and a cervical disc problem. He stated Walker would be able to manage her own funds, but her ability to remember, understand, and carry out instructions and procedures would be significantly impaired due to depression. Dr. Dean stated Walker does not interact appropriately with others, nor does she use good judgment in interacting with medical providers. He opined Walker's excessive use of Valium adversely affects her interactions. (R. 254-55)

Walker continued to receive regular counseling from Ms. Boykin, seeing her on February 10, February 24, March 1, March 13, March 29, April 12, April 26, May 23, June 14, June 28, and July 24 of 1995. (R. 460, 462, 464-67, 469-72) Walker cancelled or failed to appear for appointments on March 22, June 6, June 28, and July 31 of 1995. (R. 468, 463, 461, 459) At her visits, she continued to address relationship issues, pain management, anxiety and phobias. There is evidence Walker was over-using Valium and also was using other drugs during this period of time. (*See* R. 256, 460, 462) Indeed, on June 14, 1995, Walker admitted to Ms. Boykin that she had been "using chemicals all along," including marijuana and speed. (R. 462)

Walker concurrently continued to see medical doctors to address her pain issues. Dr. Dean's office notes from March 10, 1995, indicate Walker was using a TENS unit regularly

on both shoulders. He diagnosed her with depression, chronic pain, and possible prescription medication dependence. (R. 256) Walker went to the University of Iowa Pain Clinic for evaluation on April 7, 1995. Dr. Robert D. Matthews diagnosed her with fibromyalgia, confirmed by rheumatologic testing. X-rays of Walker's lumbar spine showed a bulging disc at C5-6. Dr. Matthews recommended Walker continue receiving psychological counseling and possibly increase the dosage of her antidepressants. He recommended Walker decrease her use of the TENS unit, and he prescribed a small dose of Baclofen and Flexeril. (R. 395-97)

On April 12, 1995, Ms. Boykin noted Walker had a better understanding of how to manage and live with the pain of fibromyalgia, and she had been doing exercises recommended by the University of Iowa Pain Clinic. (R. 466) Walker told Ms. Boykin on April 26, 1995, that in a physical exam recommended by Walker's attorney, she learned she had a herniated disc between the fifth and sixth vertebrae, and surgery had been recommended. Walker stated the doctor wanted her to continue taking Valium until after she had surgery. (R. 465)[8]

Walker next saw a medical doctor on August 12, 1995, complaining she had hurt her lower back and buttocks on a water slide. X-rays were negative, and the doctor prescribed Tylenol #3 for pain. (R. 407, 414-15) Walker was seen by Dr. Roge complaining of cold symptoms on January 30, 1996, and reported she was still using the TENS unit daily. (R. 405)

On April 22, 1996, Walker saw Terry H. Mitchell, M.D., complaining of jaundice, nausea, vomiting and diarrhea. Liver function tests were consistent with physical findings of hepatitis. Lab work indicated the presence of acute hepatitis A, and a preliminary

[8]The court was unable to locate other evidence of this medical exam and doctor's recommendations described by Walker to Ms. Boykin.

screening for hepatitis C also was positive. (R. 405, 411-12) A supplemental RIBA test confirmed the presence of the hepatitis C antibody. (R. 410)[9]

On June 16, 1996, Walker went to the emergency room after she passed out while combing her hair. Walker's daughter, who witnessed the event, said Walker did not have any seizure-like activity. Walker reported persistent symptoms of chest pain, faintness, light-headedness and nausea for the previous two days. Dr. Roge noted Walker appeared anxious and jittery, and Walker's husband reported that Walker had not been eating or drinking much. Dr. Roge prescribed Naprosyn for the chest pain, which she doubted was cardiac in nature but more likely was anxiety-related pain or possibly costochondritis. She also thought Walker could be dehydrated. (R. 400-02)

Walker saw Dr. Dean on July 15, 1996, stating she was having ups and downs. Dr. Dean diagnosed major depressive disorder, recurrent; polysubstance dependence in remission, as Walker stated she was not using drugs and was not abusing prescription medications; and chronic musculoskeletal pain. Dr. Dean recommended Walker see Ms. Boykin for follow-up. (R. 458) Walker failed to appear for a scheduled appointment with Ms. Boykin and July 24, 1996, and did not call. (R. 457) On August 8, 1996, Dr. Dean refilled Walker's prescription for Amitriptyline. Office notes indicate Walker had lost her job. (R. 456) When Walker next saw Dr. Dean on October 14, 1996, she was doing well and was fixing up her apartment. Dr. Dean's diagnosis remained unchanged from July 15, 1996. (R. 455; s*ee* R. 458)

A week later, on October 21, 1996, Walker's boyfriend called Ms. Boykin because Walker was threatening suicide. He called back to report he had called "911" to take Walker to the hospital. (R. 454) Walker was seen in the emergency room after taking an overdose of Carisoprodal, Klonopin, and Histenex DM cough syrup. She was lavaged and

[9]No evidence appears in the record to indicate Walker ever received treatment for hepatitis C, and Walker is not claiming, in this action, that she is disabled due to hepatitis. (*See* Doc. No. 8)

given charcoal. The E.R. physician called Dr. Roge, who requested that Dr. Dean follow up with Walker. (R. 404) Walker was admitted into the hospital from October 21-23, 1996, after the overdose. She was diagnosed with polysubstance dependence, and recurrent major depressive disorder. She was discharged on Premarin, a Ventolin inhaler, and Elavil, and Walker agreed to follow up with Dr. Dean and Ms. Boykin at Siouxland Mental Health. (R. 431-37)

When Walker saw Ms. Boykin on October 29, 1996, she reported she was under more stress than she had realized, which had caused her overdose. (R. 451) She was next seen on November 18, 1996, when she reported she had an appointment to try to obtain temporary work. Her outlook was positive, which she attributed to her relationship with her nine-year-old daughter. (R. 449) Walker missed her next two appointments with Ms. Boykin, and her next appointment with Dr. Dean. (R. 448, 445-46) She was not seen again until April 18, 1997, when she saw Ms. Boykin. Walker was quite agitated and had trouble sitting still. She was tearful, and reported she was living in an unsafe environment. She had evidence her boyfriend was involved in illicit drug activities. (R. 444) She saw Ms. Boykin again on April 24, 1997, and she was much calmer, although she was still living with her boyfriend. (R. 442) Walker called to reschedule her April 28, 1997, appointment, stating the police were at her home arresting her boyfriend on drug charges and they had confiscated Walker's car. (R. 443)

Dr. Dean wrote another opinion letter dated May 13, 1997, in which he opined Walker was unable to work due to chronic mental illness. He noted Walker was taking significant psychotropic medications. (R. 438, 441)

Walker saw Ms. Boykin on May 15, 1997, when she reported she was safe and working to resolve her financial problems. Walker indicated a desire to enter chemical dependency treatment, stating she had last used drugs two weeks earlier. (R. 440, 545) She called Dr. Dean on May 19, 1997, asking for a refill of Paxil, then called back and asked

for a prescription for Serzona. Office notes indicate Dr. Dean wanted Walker only on Amitriptyline. (R. 544)

On June 2, 1997, Walker saw Ms. Boykin and reported she had moved in with a neighbor temporarily. She still wanted to go to treatment, but stated she did not want to be in treatment on her birthday. (R. 543) When she saw Ms. Boykin on June 9, 1997, Walker reported she was ready to go into treatment, but she then missed her next appointment on June 30, 1997. (R. 541-42) Ms. Boykin saw Walker on July 9 and 14, 1997. She had been clean for one month and stated it was harder than she expected. She talked of considering suicide and discussed relationship issues. (R. 539-40)

Walker was seen on July 15, 1997, by Brian T. Fulton, D.O., for a psychiatric evaluation for Disability Determination Services. Dr. Fulton diagnosed dysthymia, polysubstance abuse, and borderline personality disorder, and noted Walker had reported she had neck pain and muscle spasms, and she was homeless. Dr. Fulton opined it would be difficulty for Walker to understand and remember instructions, procedures, and locations, especially if she were feeling paranoid or preoccupied with her mood or relationships. He found she would have problems interacting with others, and she had a tendency to express anger very openly and aggressively. Dr. Fulton found Walker's judgment to be impaired, and noted changes in the workplace would be a challenge for her. He suggested a payee be appointed for any benefits Walker might receive. (R. 493-95)

Walker saw Douglas W. Martin, M.D., on July 21, 1997, for a medical evaluation for Disability Determination Services. Dr. Martin found that although Walker reported a history of a bulging disk at the C5/C6 level, given her clinical history and examination he doubted the disk was herniated. The doctor noted Walker's neck pain would impact her functional capacities. He found Walker could lift/carry up to 20-25 pounds on an occasional basis; stand, move about, walk or sit without limitation in an eight-hour day; and stoop,

climb, kneel or crawl without limitation. He found she should not lift anything above head level. (R. 496-97)

Walker saw Dr. Dean again on July 21, 1997. He noted she had been experiencing hypomanic, or even typical class I bi-polar, symptoms. Walker was homeless and living in a neighbor's van. She reported significant problems getting food. Dr. Dean encouraged Walker to remain abstinent from using drugs, and referred her to Gary Lembke at Project Restore to see about getting into "Shesler."[10] Dr. Dean gave Walker some samples of Paxil, and noted she would be given samples of Depakote when they were available. (R. 535-36) Mr. Lembke did a brief intake with Walker to explain Project Restore, and he set up a meeting for Walker to meet with the director of Shesler. (R. 538) Walker filled out an application for Shesler the next day (R. 533); however, she never looked into Shesler further because, as reported by Ms. Boykin, "they have rules and [Walker] recognizes she has a problem with authority." (R. 532) Although Mr. Lembke gave Walker Shesler's phone number again on August 17, 1997 (R. 530), and Shesler had a vacancy in late August 1997 (*see* R. 527), Walker did not call to look into Shesler further. (*Id.*)

After Walker's boyfriend kicked her out in early August 1997, Walker used drugs again, rationalizing that because people suspected her of using, she might as well prove them right. (R. 529) On August 18, 1997, Walker reported to Ms. Boykin that she had not been eating or sleeping and she was having dental problems. She stopped attending her support group, but reported to Ms. Boykin on September 10, 1997, that she was "in a safe place with persons she can trust," and she had shared part of her story with her niece. (R. 525) Dr. Dean provided Walker with some samples of Paxil and Depakote on August 18 and September 17, 1997. (R. 528, 523)

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[10] From the references in the record, Shesler appears to be some type of group home connected with a program for homeless persons.

No other treatment records appear in the Record. However, several assessments were performed of Walker's physical and mental capacities for purposes of evaluating her claims for disability. On July 29, 1997, Herbert L. Notch, Ph.D., completed a Psychiatric Review Technique of Walker. He found Walker had numerous depressive symptoms, a borderline personality disorder, and a substance addiction disorder in early partial remission. Dr. Notch found Walker to be moderately restricted in the activities of daily living and maintaining social functioning. She often would have deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner, in work settings or elsewhere. She had one or two episodes of deterioration or decompensation in work or work-like settings which caused her to withdraw from the situation or to experience exacerbation of signs and symptoms. (R. 498-506) On November 19, 1997, John C. Garfield, Ph.D. reviewed the Psychiatric Review Technique performed by Dr. Notch and the evidence in Walker's file and agreed with Dr. Notch's findings. (R. 550-58)

Dr. Notch also completed a Residual Mental Functional Capacity Assessment of Walker on July 19, 1997. He found Walker to be moderately limited in her ability to carry out detailed instructions, maintain attention and concentration for extended periods, work in coordination with or proximity to others without being distracted by them, complete a normal workday and work week without interruptions from psychologically based symptoms and perform at a consistent pace without an unreasonable number and length of rest periods, and get along with coworkers or peers without distracting them or exhibiting behavioral extremes. He did not find Walker to have any other limitations. (R. 507-10) On November 19, 1997, Dr. Garfield reviewed Dr. Notch's Mental Residual Functional Capacity Assessment and the evidence in Walker's file and agreed with Dr. Notch's findings. (R. 559-62)

On August 8, 1997, James W. Ryan, Jr., M.D. performed a Residual Physical Functional Capacity Assessment. Dr. Ryan found Walker's physical exam to be essentially

normal, revealing only minor abnormalities of her left upper extremity. He found Walker could lift 50 pounds occasionally and 25 pounds frequently[11]; she could stand, walk or sit for about six hours in an eight-hour day; and she could push or pull without limitation. (R. 563-75) B.T. Woodburn, M.D., reviewed the evidence in file on August 12, 1997, and affirmed Dr. Ryan's findings. (R. 573, 574)

On October 12, 1997, Dr. Brian T. Fulton performed a Social Security Disability Evaluation of Walker at the request of the Social Security Disability Determination Services Bureau. (R. 546-49) Dr. Fulton diagnosed Walker with the following:

Axis I:	Dysthymia Methamphetamine abuse in early partial remission Cannabis abuse
Axis II:	Borderline personality disorder
Axis III:	S/P neck injury
Axis IV:	Recently expelled roommate
Axis V:	GAF = 55[12]

(R. 548) With regard to specific questions posed by the Bureau, Dr. Fulton stated:

> Ms. Walker describes episodes when she has low mood and she is paranoid. . . . During these times she is going to have difficulty remembering and understanding instructions, procedures, and locations. Also at these times, carrying out instructions, maintaining her attention and her concentration and her pace would be negatively affected. Interactions with others are frequently characterized by unstable relationships and intense anger. Judgement is impaired. Changes in the work place would be moderately difficult for her.

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[11]Dr. Ryan expressly disagreed with the consulting examiner's assessment that Walker could only lift 25 pounds. (R. 575)

[12]"A GAF score of 55 indicates at least moderate symptoms or moderate difficulty in [psychological], occupational, or social functioning. *Id.* at 12." *Vargas v. Lambert*, 159 F.3d 116, 1164 (9th Cir. 1998).

(*Id.*) Dr. Fulton recommended that a payee be appointed to manage any benefits Walker might receive. (R. 548-49)

On June 12, 1998, Dr. Dean completed a Mental Impairment Questionnaire at the request of Walker's attorney. Dr. Dean noted he had not seen Walker since January 1998, having followed her treatment from 1994 through January 1998. Based on that time frame, Dr. Dean reported that Walker had chronic and recurrent depression with a long history of suicide attempts, and no physical limitations. Her psychiatric prognosis was poor. She had "good" mental abilities and aptitude for remembering work-like procedures, understanding and remembering very short and simple instructions, asking simple questions or requesting assistance. Her abilities were "fair" for accepting instructions and responding appropriately to criticism from supervisors, getting along with coworkers or peers with unduly distracting them or exhibiting behavioral extremes, being aware of normal hazards and taking appropriate precautions, understanding and remembering detailed instructions, setting realistic goals or making plans independently of others, interacting appropriately with the general public, maintaining socially appropriate behavior, adhering to basic standards of neatness and cleanliness, and using public transportation.

Walker's ability was "poor or none" with respect to maintaining attention for a two-hour segment; maintaining regular attendance and being punctual within customary, usually strict tolerances; sustaining an ordinary routine without special supervision; working in cooperation with or proximity to others without being unduly distracted; making simple work-related decisions; completing a normal workday and workweek without interruptions from psychologically-based symptoms; performing at a consistent pace without an unreasonable number and length of rest periods; responding appropriately to changes in a routine work setting; dealing with normal work stress; carrying out detailed instructions; dealing with the stress of semi-skilled and skilled work; or traveling in unfamiliar places.

Dr. Dean opined Walker's degree of functional limitation was marked in her restriction of the activities of daily living, extreme in her difficulties in maintaining social functioning; and she would have frequent deficiencies of concentration, persistence or pace resulting in a failure to complete tasks in a timely manner, in work settings or elsewhere.

A similar questionnaire was completed by Philip Muller, D.O., on June 24, 1998, who reported seeing Walker about every three months, without giving a particular time frame. Although his assessment of Walker's individual abilities different in some respects, overall Dr. Muller agreed with Dr. Dean's assessment of Walker's functional limitations. (R. 587-94)

4. The ALJ's conclusion

The ALJ found Walker has a "severe" impairment that restricts her capacity for routine work activity more than minimally, as follows:

> mild to moderate left lateral recess and neural foraminal stenosis at cervical disc level C5-C6 due to a small disc protrusion and mild spondylosis; major depressive disorder, recurrent; borderline personality disorder, and polysubstance dependence, in apparent early remission.

(R. 41, ¶ 2) However, he found Walker does not have an impairment or combination of impairments listed in, or medically equal to one listed in the Social Security regulations. (*Id.*) Further, the ALJ found Walker's subjective claims that she is totally incapacitated as a result of her medical impairments were not supported by the record as a whole. He noted Walker

> has not provided a clinical record sufficient to document discernible physical and mental abnormalities in significant numbers and detail necessary for [the ALJ] to reasonably conclude that her impairments preclude her, or have precluded her, from performing any type of work on a competitive basis

> for a period of time exceeding the durational requirements established by the Act.

(R. 41-42, ¶¶ 4, 5)

The ALJ found Walker has not engaged in substantial gainful activity since April 4, 1994. (R. 20) However, although Walker is unable to perform the duties of any of her past relevant work, and although none of the skills from her past work "could readily be transferred to occupations that remain within the range of her residual functional capacity," she nevertheless retains the residual functional capacity to perform a number of sedentary occupations which exist in significant numbers in the local and national economies, citing examples of document preparer, parking lot attendant, and office helper. (R. 42, ¶¶ 7, 10, 11) Accordingly, the ALJ found Walker was not under a disability as defined by the Social Security Act at any time through the date of his decision, and therefore was not entitled to benefits. (R. 19; 43, ¶ 12)

The ALJ noted that Walker has a significant history of problems abusing alcohol and other drugs, and if her disability would not be present absent that behavior, then she cannot be found to be disabled for Social Security purposes. (R. 18) As such, he considered Walker's substance abuse only as it reflected on her other alleged impairments. (R. 19) The ALJ made a detailed and thorough review of Walker's medical history, and concluded that "in addition to her physical impairment, [Walker] has also chronically experienced medically determinable psychological impairments." (R. 31) The ALJ therefore completed a Psychiatric Review Technique Form (R. 44-48), arriving at the following conclusions:

> [Walker] is subject to a disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by anhedonia or pervasive loss of interest in almost all activities, appetite disturbance with change in weight, psychomotor agitation or retardation, decreased energy, and feelings of guilt or worthlessness. . . . [Walker] has also clearly demonstrated inflexible and maladaptive personality traits which cause either significant impairment in social or occupational functioning or

> subjective distress, as evidenced by intense and unstable interpersonal relationships and impulsive and damaging behavior. Thus, [Walker] has provided sufficient evidence to establish that she has a medically determinable personality disorder, as evaluated under the Part A criteria of section 12.08 of the Listings.

R. 32)

The ALJ next turned to an evaluation of whether Walker's medically determinable psychological impairments resulted in any limitations on her ability to function. He found Walker has moderate restrictions in the activities of daily living. While acknowledging her daily existence has, at times, "been rather unsettled and chaotic, including periods of virtual homelessness," the ALJ found no indication Walker "is not completely capable of independently caring for her personal needs," and she completes routine household tasks, although they sometimes take longer than she feels they should. (R. 32) The ALJ noted Walker had "not reported significant difficulties as regards activities of daily living to treating medical sources." (R. 33)

Similarly, the ALJ found Walker to have only moderate difficulties in maintaining social functioning. Noting Walker often reported staying with friends, in friends' cars, getting medications from friends, and the like, the ALJ concluded Walker had "at least some limited social support." (*Id.*)

The ALJ found Walker often experiences significant deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner, and Walker had "experienced one or two episodes of deterioration and decompensation in work or work-like settings which caused her to withdraw from the situation or to experience exacerbation of signs and symptoms." (R. 33-34)

The ALJ concluded Walker has a "severe" mental impairment, but also concluded Walker "does not suffer from at least two marked degrees of functional limitations as set forth in the [regulatory] criteria." (R. 34) As a result, the ALJ went on to consider

Walker's residual functional capacity. He concluded Walker had not been so incapacitated that she would be precluded from all types of work, and found Walker's testimony to the contrary not to be credible. (R. 34-35) With regard to Walker's physical condition, the ALJ found the evidence of record to "suggest that [Walker] has retained a significant measure of physical capacity despite her medically determinable cervical disc impairment." (R. 35) The ALJ found Walker

> is physically capable of sitting for continuous periods up to one hour, and that she remains able to sit for up to a total of eight hours in a vocational capacity. She is able to stand continuously up to one hour at a time, with total standing during a typical work day being limited to six hours. She is able to walk continuously for at least 30 minutes She remains able to lift and carry 20 to 25 pounds occasionally, and up to 10 pounds on a more frequent basis. She is capable of performing vocational activities requiring kneeling, squatting, stooping, crawling, climbing, pushing and pulling, and the operation of hand and foot controls on an occasional basis, and she can also bent at the waist occasionally. She remains able to use both hands for simple grasping, manipulation and handling, but she should avoid activities requiring the use of her arms for reaching above the shoulder and head level.

(R. 37-38)

With regard to Walker's mental condition, the ALJ concluded Walker

> has retained the mental capacity to perform simple and routine work involving only repetitive operations. She should avoid occupations which would routinely produce more than normal levels of psychological stress, such as jobs requiring a high pace of production. [Walker] remains able to superficially interact with the general public. While [Walker] retains the capacity to occasionally interact with coworkers, jobs requiring frequent and intense interaction with coworkers should be avoided."

(R. 38)

Specifically referencing the opinion of Walker's treating psychiatrist Dr. Dean, the ALJ found Dr. Dean's opinion that Walker is unable to work due to chronic mental illness to be "inconsistent with his observations as documented by the treatment records," for the following reasons:

> [Dr. Dean's] mental status evaluation of [Walker] at the time of her hospitalization on October 21, 1996, indicates that while she did report some symptoms of depression, there were no psychotic symptoms. Judgement and insight were rated as fairly limited, but memory appeared adequate and cognitive modalities were noted to be intact. [Walker] was noted to be currently only passively suicidal, and while she stated that she had taken an overdose of drugs in order to die, the doctor questioned whether that was her initial intent. The doctor noted that he had been able to reduce the amount of Valium [Walker] had been talking, and that she had been doing fairly well as of late[;] however, although [Walker] had not mentioned it during a recent contact, she had relapsed in terms of her illicit drug usage. [Dr. Dean] noted that [Walker] had reduced her nutritional intake, and she admitted to multiple drug usage, including methamphetamines, cocaine, marijuana, alcohol, PCP and LSD. On May 15, 1997, [Walker] admitted to Ms. Boykin that she had been "cranking" as recently as two weeks previously.
>
> On July 21, 1997, Dr. Dean noted that during the time he had been treating [Walker] she had had a variety of diagnoses, mainly recurrent depression and polysubstance dependence. [Walker] felt that things might be straightening out for her as she was currently undergoing intensive outpatient chemical dependency treatment. [Walker] for the first time mentioned significant mood changes which the doctor felt might represent a bipolar disorder. However, it was also noted that [Walker] was currently homeless, living in a van, and that she was having difficulty providing herself with basic necessities. The doctor referred [Walker] to a local homeless program, but subsequent treatment notes from Ms. Boykin indicate that

> [Walker] did not follow-up on that advice. She continued to live and associate with her past acquaintances.

(R. 35-36; citations to exhibits omitted)

The ALJ also discounted the opinion of Phillip Muller, D.O., because Walker "has not provided clinical data on which to evaluate [Dr. Muller's] statement, made to [Walker's] counsel, which would indicate that the severity of [Walker's] impairment would preclude all work activity." (R. 37) The ALJ acknowledged that both Dr. Dean and Dr. Muller had provided statements to Walker's attorney regarding Walker's disability, but noted:

> If these statements were found to be credible, they would provide substantial evidence that the severity of [Walker's] mental impairment would meet the severity of conditions listed in the [Regulations. However, [the ALJ] once again finds little clinical support for the statement made by Dr. Dean, and it is noted that his opinion would necessarily be clouded because of [Walker's] obvious noncompliance with treatment recommendations, including her continued abuse of illicit drugs."

(R. 36)

The ALJ concluded:

> [I]f all of [Walker's] allegations were fully credible, and if the above-mentioned recent assessments provided to her attorney by Dr. Dean and Dr. Muller were found to credibly present accurate pictures of [Walker's] ongoing functional capacity, her ability to retain regular employment for prolonged periods of time would be significantly limited. However, it must be kept in mind that [Walker's] allegations, and the statements made by her treating physicians are not self-proving. The critical inquiry is whether the allegations and reports are credible. While [the ALJ] acknowledges that [Walker] will continue to experience some instability in regards to interpersonal relationships, there is little substantial evidence in the record to support her contention that her psychological discomfort

> would be so severe as to completely preclude her from performing routine work activity. This is especially true given her continued abstinence from alcohol or illicit drugs, and her continued strict compliance with the treatment recommendations of her physicians and other therapists. [Walker's] subjective complaints, as well as the opinions of treating sources that she is disabled, without a sufficient amount of required documentation, cannot established disability on the part of [Walker.]

(R. 37)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering . . . his age, education and work experience, engage in any other kind of substantial gainful work which exists in [significant numbers in] the national economy . . . either in the region in which such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley*, 133 F.3d at 587-88 (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, "one that significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133

F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *Hunt v. Heckler*, 748 F.2d 478, 479-80 (8th Cir. 1984) ("[O]nce the claimant has shown a disability that prevents him from returning to his previous line of work, the burden shifts to the ALJ to show that there is other work in the national economy that he could perform.") (citing *Baugus v. Secretary of Health & Human Serv.*, 717 F.2d 443, 445-46 (8th Cir. 1983); *Nettles v. Schweiker*, 714 F.2d 833, 835-36 (8th Cir. 1983); *O'Leary v. Schweiker*, 710 F.2d 1334, 1337 (8th Cir. 1983)).

Step five requires that the Commissioner bear the burden on two particular matters:

> In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added) *accord Weiler*, 179 F.3d at 1110 (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there

were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work, and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Weiler v. Apfel*, 179 F.3d 1107, 1109 (8th Cir. 1999) (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley v. Callahan*, 133 F.3d 583, 587 (8th Cir. 1998) (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, substantial evidence means something "less than a preponderance" of the evidence, *Kelley*, 133 F.3d at 587, but "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); *accord Ellison v. Sullivan*, 921 F.2d 816, 818 (8th Cir. 1990). Substantial evidence is "relevant evidence which a reasonable mind would accept as adequate to support the [ALJ's] conclusion." *Weiler*, 179 F.3d at 1109 (again citing *Pierce*, 173 F.3d at 706); *Perales*, 402 U.S. at 401, 91 S. Ct. at 1427; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993); *Ellison*, 91 F.2d at 818.

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account "'whatever in the record fairly detracts from'" the weight of the ALJ's decision. *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95

L. Ed. 456 (1951)); *accord Gowell, supra; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213). Thus, the review must be "more than an examination of the record for the existence of substantial evidence in support of the Commissioner's decision"; it must "also take into account whatever in the record fairly detracts from the decision." *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987)). The court, however, does "not reweigh the evidence or review the factual record *de novo.*" *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992) (citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court "might have weighed the evidence differently," *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)), because the court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); *accord Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001); *Gowell, supra.*

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.*, 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen*, 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v.*

Secretary of H.H.S., 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.*, 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984)). Under *Polaski:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d at 1322.

IV. ANALYSIS

Walker argues the ALJ erred in finding she retains the residual functional capacity to work. She claims that in making such a finding, the ALJ "applied incorrect standards in evaluating testimony and other evidence." (Doc. No. 8, p. 1) In particular, Walker argues the ALJ posed an improper hypothetical to the VE, and improperly discounted the opinions of Walker's treating psychiatrists, Drs. Dean and Muller. The Commissioner disagrees, arguing the ALJ's findings are supported by substantial evidence in the record.

The court will consider each of Walker's arguments, addressing first the weight the ALJ gave to the opinions of Drs. Dean and Muller.

A. Weight Given to Treating Physicians' Opinions

In *Prosch v. Apfel*, 201 F.3d 1010 (8th Cir. 2000), the Eighth Circuit Court of Appeals discussed the weight to be given to the opinions of treating physicians:

> The opinion of a treating physician is accorded special deference under the social security regulations. The regulations provide that a treating physician's opinion regarding an applicant's impairment will be granted "controlling weight," provided the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." 20 C.F.R. § 404.1527(d)(2). Consistent with the regulations, we have stated that a treating physician's opinion is "normally entitled to great weight," *Rankin v. Apfel*, 195 F.3d 427, 430 (8th Cir. 1999), but we have also cautioned that such an opinion "do[es] not automatically control, since the record must be evaluated as a whole." *Bentley v. Shalala*, 52 F.3d 784, 785-86 (8th Cir. 1995). Accordingly, we have upheld an ALJ's decision to discount or even disregard the opinion of a treating physician where other medical assessments "are supported by better or more thorough medical evidence," *Rogers v. Chater*, 118 F.3d 600, 602 (8th Cir. 1997), or where a treating physician renders inconsistent opinions that undermine the credibility of such opinions, *see Cruze v. Chater*, 85 F.3d 1320, 1324-25 (8th Cir. 1996).
>
> Whether the ALJ grants a treating physician's opinion substantial or little weight, the regulations provide that the ALJ must "always give good reasons" for the particular weight given to a treating physician's evaluation. 20 C.F.R. § 404.1527(d)(2); *see also* SSR 96-2p.

Prosch, 201 F.3d at 1012-13. *Accord Wiekamp v. Apfel*, 116 F. Supp. 2d 1056, 1063-64 (N.D. Iowa 2000) (Bennett, C.J.).

As discussed above, the ALJ took great pains to recite his specific reasons for discounting the opinions of Drs. Dean and Muller. He cited instances in the Record where Dr. Dean's opinion seemed to conflict with individual treatment notes. Dr. Dean initially diagnosed Walker with dysthymia and recurrent depression on November 2, 1994. (R. 251-53, 482-84) On February 9, 1995, Dr. Dean noted Walker's condition was chronic and long-standing, and she was significantly impaired in terms of her ability to function in any type of gainful employment, due both to her back pain and her chronic depressive state. He found that although Walker was able to manage her own funds, she was significantly impaired due to depression in her ability to remember, understand, and carry out instructions and procedures, and her ability to interact appropriately with others. (R. 254-55) Dr. Dean's diagnoses remained unchanged when he saw Walker on March 10, 1995; July 15, 1996 (although at this visit Walker reported she was not using drugs, which later turned out to be false); October 14, 1996 (despite the fact that Walker reported she was fixing up her apartment); and October 21-23, 1996, when Walker was hospitalized. In Dr. Dean's first opinion letter regarding Walker, dated May 13, 1997, he stated she was unable to work due to chronic mental illness. (R. 438, 441) On July 21, 1997, Dr. Dean added a diagnosis of possible Type II Bi-Polar Disorder. (R. 535-37)

The entries the ALJ deemed to be inconsistent with Dr. Dean's opinion regarding Walker's disability begin with Walker's hospitalization in October 1996, when Dr. Dean noted Walker evidenced no psychotic symptoms, and although her judgment and insight were fairly limited, her "memory appeared adequate and cognitive modalities were noted to be intact." (R. 35-36) In discussing later entries, the ALJ placed emphasis on the fact that Walker had lied to Dr. Dean about the fact that she was continuing to use illicit drugs and/or abuse prescription drugs, which the ALJ concluded could have impacted Dr. Dean's overall assessment of Walker.

The ALJ concluded there was "little substantial evidence in the record to support [Walker's] contention that her psychological discomfort would be so severe as to completely preclude her from performing routine work activity . . . especially . . . given her continued abstinence from alcohol or illicit drugs, and her continued strict compliance with the treatment recommendations of her physicians and other therapists." (R. 37) However, this conclusory statement regarding Walker's condition in the absence of alcohol or other drugs is not supported by substantial evidence in the record. The court finds the record to be inadequate to make a determination as to whether Walker's "drug addiction or alcoholism is a contributing factor material to the determination of disability" – a determination that is required by the Regulations. *See* 20 C.F.R. § 404.1535 (relating to disability

applications)[13]; 20 C.F.R. § 416.935 (relating to SSI applications) (these two regulations are identical).

When the Commissioner makes a finding of disability, and there is medical evidence of the claimant's addiction to alcohol or other drugs, then the Commissioner must determine whether the claimant's drug addiction or alcoholism is a contributing factor material to the

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> How we will determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability.
>
> (a) General. If we find that you are disabled and have medical evidence of your drug addiction or alcoholism, we must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability.
>
> (b) Process we will follow when we have medical evidence of your drug addiction or alcoholism.
>
> (1) The key factor we will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol.
>
> (2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination, would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.
>
> (i) If we determine that your remaining limitations would not be disabling, we will find that your drug addiction or alcoholism is a contributing factor material to the determination of disability.
>
> (ii) If we determine that your remaining limitations are disabling, you are disabled independent of your drug addiction or alcoholism and we will find that your drug addiction or alcoholism is not a contributing factor material to the determination of disability.

disability determination. *Id.* The "key factor" in the determination "is whether the claimant would still be found disabled if he or she stopped using drugs or alcohol." *Pettit*, 218 F.3d at 903 (citing 20 C.F.R. § 404.1535(b)(1); *Jackson, supra*).

The ALJ found Walker to be disabled, but failed to proceed to step two of this evaluation. Although the ALJ suggested Walker might not be disabled in the absence of drug or alcohol use, the ALJ stopped short of making such a finding, and the record does not support a finding that Walker would, or would not, be disabled absent her alcoholism or addiction.

At this stage, the burden of proof is on the claimant to show alcoholism or drug addiction is not a material factor to the finding of disability. *Estes v. Barnhart*, 275 F.3d 722, 725 (8th Cir. 2002) (citing *Mittlestedt v. Apfel*, 204 F.3d 847, 852 (8th Cir. 2000)); *Pettit v. Apfel*, 218 F.3d 901, 903 (8th Cir. 2000) (citing *Brown v. Apfel*, 192 F.3d 492, 497-98 (5th Cir. 1999)). Nevertheless, it is the ALJ's duty to fully and fairly develop the record, *see Bishop v. Sullivan*, 900 F.2d 1259, 1262 (8th Cir. 1990)*; Driggins v. Harris*, 657 F.2d 187, 188 (8th Cir. 1981); particularly when the medical evidence already in the record fails to provide a sufficient basis to support a decision favorable to the Commissioner. *Scott v. Apfel*, 89 F. Supp. 2d 1066, 1076 (N.D. Iowa 2000) (Bennett, C.J.). Indeed, the ALJ has an affirmative duty to actually assist the claimant in developing the record fully and fairly, even when the claimant is represented by counsel. *Battles v. Shalala*, 36 F.3d 43, 44 (8th Cir. 1994); *accord Cox v. Apfel*, 160 F.3d 1203, 1209 (8th Cir. 1998); *Johnson v. Callahan*, 968 F. Supp. 449, 458 (N.D. Iowa 1997); *Barry v. Shalala*, 885 F. Supp. 1224, 1241-42 (N.D. Iowa 1995).

The court finds the Record is inadequate to support the Commissioner's determination that Walker is not disabled, and further finds the Record is inadequate to support the opposite conclusion. Therefore, the court recommends this matter be remanded for the purpose of obtaining additional evidence from Walker's treating physicians, and such other

evidence the parties deem advisable, on the issue of whether Walker's use of alcohol or other drugs is a material factor to the finding of disability.

B. Improper Hypothetical

The ALJ's hypothetical to the VE was based upon the ALJ's assessment of Walker's residual functional capacity, both mental and physical. The hypothetical failed to include Walker's condition as described by Drs. Dean and Muller because, as discussed above, the ALJ discounted those opinions. However, also as discussed above, the record is unclear as to whether Walker's treating physicians' opinions were intended to describe Walker's condition as it would be in the absence of alcoholism or addiction. It seems clear that if all the functional limitations described by Walker's treating physicians were included in the hypothetical, no VE could find Walker would be able to engage in substantial gainful employment.

Because the record is inadequate to determine the extent of Walker's residual functional capacity in the absence of alcoholism or addiction, the court recommends this case be remanded as set forth above.

V. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections[14] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that the case be reversed and remanded for further development of the record, and reconsideration based on such additional evidence.

IT IS SO ORDERED.

DATED this 16th day of July, 2002.

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PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[14]Objections must specify the parts of the Report and Recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).